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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 253**

**[Docket No. 180220192-8192-01]**

**RIN 0648–BH82**

**Shipping Act, Merchant Marine, and Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) Provisions; Fishing Vessel, Fishing Facility and Individual Fishing Quota Lending Program**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule.

**SUMMARY:** The NMFS' Fisheries Finance Program (FFP or Program) proposes to revise the operating rules of the Program and set forth procedures, eligibility criteria, loan terms, and other requirements to add FFP financing to construct fishing vessels or reconstruct fishing vessels in limited access fisheries that are neither overfished or subject to overfishing. NMFS believes that this change will help preserve the economic benefits the nation derives from its commercial fishing fleets. Aging fishing vessels will need to be replaced. This will allow the FFP to play a small role in this process. Additionally, new fishing vessels will provide a safer environment for fishing crews and will be more fuel efficient. The rule provides for controls over the uses of replaced vessels that might otherwise contribute to additional harvesting efforts that could lead to overfishing. Currently, the Program provides loans to purchase, refurbish, or refinance fishing vessels, fish processing facilities, aquaculture facilities and individual fishing quota (IFQ)

permits. The program also offers loans to community development quota (CDQ) groups to borrow for traditional loan purposes. NMFS also recently amended its regulations to add the purchase or refinancing of federally managed harvesting rights in limited access fisheries.

**DATES:** The comment period for this draft rule ends [*Insert date 45 days from publication in the Federal Register*].

**ADDRESSES:** You may submit comments, identified by NOAA-NMFS-2014-0062, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal. *Go to [www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2014-0062](http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2014-0062), click the “Comment Now!” icon, complete the required fields and enter or attach your comments.*

- Fax: 301-713-1305, Attn: Earl Bennett;

- Mail: Earl Bennett, Program Leader, FFP, Financial Services Division, NMFS, Attn: F/MB5, 1315 East West Highway, SSMC3, Silver Spring, MD 20910

*Instructions:* All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** Earl Bennett, NMFS, Fisheries Finance Program, (301)–427–8765.

**SUPPLEMENTARY INFORMATION:**

## **Electronic Access**

This proposed rule is also accessible at <http://www.gpoaccess.gov/fr>.

## **Background**

Since 1997, the FFP has provided direct loans (loan guarantees prior to that) at 2 percentage points above the Treasury borrowing rate. All FFP vessel loans are collateralized by the fishing vessel, and often include additional collateral and/or guarantees. The creditworthiness of borrowers is also examined to ensure their ability to repay the loan. These provide a means of recovery in the event of a payment default. To date, less than one percent of borrowers have defaulted.

In 2016, Congress passed section 302 of the Coast Guard Authorization Act of 2015 (the “Act”) (Pub. L. 114 – 120) which included specific authority for the Program to finance the construction or reconstruction of fishing vessels in a fishery that is managed under a limited access system. (16 U.S.C. Section 1802)

This rule is being proposed because of concerns raised by commercial fisheries that private commercial markets improperly evaluate the risk associated with capital needs of the fishing industry, leading to shorter amortization periods and higher interest rates than would support the upfront investment required for new vessel construction. Current FFP regulations prohibit financing the cost of new vessel construction. There was a time when there were many open domestic fisheries. It was deemed important that the program would not add harvesting capacity to unregulated fisheries. Now NMFS is proposing to restrict new vessel construction to fisheries with a limited access system which is consistent with the goal to have sustainable fisheries.

This rule, if finalized, removes the prohibition on new vessel construction and reconstruction financing. The rule would also provide the same general loan requirements for new vessel construction that apply to all traditional loans. These changes would have no effect on currently allowed fisheries financing activities, including current traditional loans and the separately authorized Northwest halibut and sablefish quota share (HSQS), Bering Sea and Aleutian Island (BSAI) crab IFQ, and North Pacific CDQ loans except that it would also explicitly state that loans are restricted to fisheries that are subject to managed limited access systems that are neither overfished or subject to overfishing.

Other than specifically identified, this rule if implemented would not change any of the existing FFP regulations, requirements or procedures.

NMFS specially notes that in response to the industry's concerns, the FFP does take into consideration the value of permits, quota share or other harvesting rights associated with the project being financed. The value of harvesting rights will be taken into consideration when determining the adequacy of collateral.

### **Vessel Construction and Reconstruction Financing Overview**

The replacement of aged vessels in managed fisheries will result in the more efficient use of fisheries, promote safety at sea, and improve environmental operations of fishers. Furthermore, recapitalization and modernization of an over-aged fishing fleet goes hand-in-hand with effective fisheries management.

Based on current loan authority amounts, the rule change would provide the opportunity for a small number of fishers in federally managed limited access fisheries, setting total allowable catch limits, to modernize their operations by building new, replacement vessels, or

rebuilding their current vessels. Loans will only be available for projects in fisheries that are in managed limited access systems that are not deemed to be overfished or subject to overfishing.

Even though fishing vessels can be replaced, without the benefit of FFP loans, the fishing industry cannot always find the feasible, long-term, fixed-rate financing necessary to make a replacement vessel economically viable. Smaller, one-vessel operators often have a hard time finding adequate financing. Variable interest rates increase the economic uncertainty of fishing operations that are already subject to variations in weather, prices, and total allowable catch. The availability of the FFP will provide some stability in one critical aspect of managing a fishing operation.

To ensure the FFP program does not contribute to over-fishing, loans provided for the construction or reconstruction of fishing vessels that increase capacity, not to be confused with increased harvesting, would be provided only where no affected species are overfished or subject to overfishing.

As is the current practice, the FFP will notify the fisheries Regional Administrators of a loan application to ensure that it meets the requirements of the fishery(ies) in which the new vessel will participate. Since the new vessel will replace an existing vessel, as explained below, and will fish under the old vessel's permits, all harvesting must be part of the fisheries management plan. The FFP would not provide financing if the fisheries management plan could not support the harvesting level, regardless of the increased fishing capacity of the new vessel, required for the applicant to be financially viable.

NMFS would implement the new vessel construction and reconstruction loans on the same equitable first come, first served basis based on individual qualifications as current loans. That is, the FFP would evaluate each vessel construction or reconstruction project on the basis of

its ability, with present permits and entitlements and overall catch limitations, to repay the requested loan. This includes recent fluctuations in the conditions of the fisheries, prices, economics, useful life of the fishing vessel, and financial condition of the borrower. As a result, projections of total allowable catch over time are not useful for evaluating the financial viability of a certain project as it is too speculative. However, present catch limits do provide valuable perspective on the current financial condition of a prospective borrower. If the subject fishery becomes “deemed to be overfished” while the loan application is under consideration, the FFP would cease processing the loan at that point. Applicants need to be mindful that the current application fee of one half of one percent of the amount requested once paid, irrespective of why the Program denies a loan, statutory provisions limit refunds to fifty percent of the fee. The proposed revisions also clarify that NMFS only extends financing in managed fisheries under limited access systems.

This rule would also address the issue of what to do with the replaced vessels. While the replaced vessels may be old and in need of modernization, they may retain substantial market value. A borrower may choose from the following options:

- a) The replaced vessel will be scrapped,
- b) The vessel will continue to operate in a federally-managed fishery under limited access, or
- c) The federal fishery endorsement will be permanently cancelled and the vessel will be prohibited from fishing or providing support to fishing activities anywhere in the world; the vessel’s title will also be marked to prohibit the vessel’s transfer to any foreign flag. If the vessel were ever to cease operation in a federally-managed fishery under limited access or is sold, then option c) would automatically apply.

The requirements under these options would have to be completed within four months of the loan closing(s). If the borrower selects option c), at loan closing the borrower would authorize the Program and the United States Coast Guard to act on the borrower's behalf to have the fisheries endorsement revoked and have the vessel's title amended to prohibit a transfer to a foreign flag. In addition, failure to complete any of the tasks outlined in the options above would be considered an event of default under the loan.

### **Vessel Construction Borrowing Opportunities**

Borrowers would be able to participate in new vessel construction financing in two basic ways: direct construction financing, or "take-out" financing of private sector construction loans.

*Direct construction financing* – The FFP would provide up to 80 percent of the cost of financing a new fishing vessel during its construction. The vessel owner would commit 20 percent to the project and keep a reserve of as much as thirty (30) percent of the estimated cost to cover potential cost overruns. Or, in lieu of a reserve account, the vessel owner would be responsible for securing a completion bond or insurance, as approved by the FFP. The program would make periodic payments to the shipyard as key milestones were met as verified by the surveyor reporting to NMFS. This would necessitate the vessel owner closing multiple loans over the construction period – each closing having its own costs – and accruing interest on those loans while the vessel/partial vessel was still in the yard. Finally, FFP loan commitments would be usable within a five-year period of obligation as long as the applicant remains qualified. The vessel construction project would have to be completed and funded within that time. Project risk faced by the FFP in this option would be higher than take out financing.

*Take-out financing* – The FFP could evaluate a new vessel construction project and, based on that evaluation, make a commitment to refinance non-FFP construction loans after

completion of the construction. With the availability of take-out financing, the vessel owner may secure prime-rate construction financing in the private sector. Once the vessel was successfully completed (including sea trials), fully licensed and permitted in its intended fishery and the vessel owner was in compliance with all loan terms, NMFS would disburse funds to the construction financing lender. There would be just one closing, which would refinance up to 80 percent of the eligible costs of construction. Project risk with this option would be relatively low for the FFP.

Finally, the Act now specifically allows vessels over 165 feet in length in Pacific Northwest fisheries to be considered for FFP loans. The cost of these vessels is likely to exceed \$130 million each. Construction costs of vessels of 300 feet or greater length may exceed \$170 million. The FFP authorized lending each year is presently \$100 million and is limited by statute to a total outstanding principal balance of \$850 million.

### **Comments Requested**

NMFS seeks comments on this proposed rule, particularly concerning the orderly implementation of the rule, the conditions placed on new vessel construction loans, and the reserve account requirements. NMFS is also interested in what time-frames should be expected for the construction of a new fishing vessel of less than 100 feet, or more than 100 feet? Should NMFS solely provide construction financing, or should it consider refinancing private sector construction debt? What are reasonable terms for shipyard performance bonds or insurance on vessel construction? How should the vessel surveyor or engineer, reporting to NMFS, be contracted? Should a replaced vessel be allowed to become a replacement vessel within the same federally managed fishery, a different federally managed fishery, or should it be scrapped



altogether in order to qualify for the loan? Transfer to a non-regulated fishery would not be allowed.

Over the last 2 years, the average interest rate charged for FFP loans was 4.53 percent. NMFS also specifically seeks comments regarding the industry standard for interest charged for new vessel construction loans.

NMFS welcomes comments on these and any related questions regarding financing of new fishing vessels.

### **Changes in the Proposed Rule**

The general definitions at § 253.10 will revise the definition of “Project” to include construction of a new fishing vessel and adds definitions for “Vessel construction financing” and “limited access system.” Revisions to §253.16 regarding actual cost, would redesignate and revise paragraph (d) to paragraph (e) and adds new paragraph (d) to provide the basis for determining the actual cost of vessel construction lending. Traditional loans at §253.26 parts (a) and (b) are revised to include implementing guidance for new vessel construction. A new section, Vessel construction financing, is added as § 253.32 to provide requirements specific to new vessel construction financing. The new section § 253.33 is added to codify NMFS’ policy that all financings shall require participation in managed fisheries with harvest limitation. Moreover, vessel construction and harvesting rights loan participation will be further restricted to federally managed limited access systems. NMFS also made minor changes to correct errors or improve readability that do not affect the substantive provisions of the rule.

### **Classification**

This proposed rule is published under the authority of, and is consistent with, Chapter 537 of Title 46 of the United States Code and the Magnuson-Stevens Act, as amended. The

NMFS Assistant Administrator has determined that this proposed rule is consistent with Chapter 537 of Title 46 of the U.S. Code, the Magnuson-Stevens Act, as amended, and other applicable law, subject to further consideration after public comment.

In addition to public comment about the proposed rule's substance, NMFS also seeks public comment on any ambiguity or unnecessary complexity from the language used in this proposed rule.

### *NEPA*

NMFS has made a preliminary determination that this rule qualifies to be categorically excluded from further NEPA review. This action is consistent with categories of activities identified in CE G7 of the Companion Manual for NOAA Administrative Order 216-6A, and we have identified no extraordinary circumstances that would preclude this categorical exclusion. NMFS is accepting comments and information during the public comment period for the proposed rule relevant to our preliminary categorical exclusion determination.

### *Executive Order 12866*

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

This proposed rule does not duplicate, overlap, or conflict with any other relevant Federal rules.

### **Regulatory Flexibility Act**

The Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this proposed rule,

if adopted, would not have a significant economic impact on a substantial number of small entities.

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, *et seq.*, requires that, whenever an agency is required by section 553 of this title (5 U.S.C. 553), or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. 5 U.S.C. 603(a). However, where an agency can certify that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities then an agency need not undertake a full regulatory flexibility analysis. 5 U.S.C. 605(b).

Participation in the FFP is entirely voluntary. This action imposes no mandatory requirements on any business. If finalized, this proposed rule would implement programs authorized by law. Specifically, this rule would create a new lending purpose authorized by the Act and would be implemented in accordance with 50 CFR part 253, subpart B. This action will create new § 253.32 and amend several other sections.

As defined by NMFS for RFA purposes, this rule may affect small fishing entities that have annual revenues of \$11.0 million or less, including, but not limited to, vessel owners, vessel operators, individual fishermen, small corporations, and others engaged in commercial fishing activities regulated by NMFS. Borrowers under this authority may also include large businesses. Notably, because the FFP is a voluntary program that provides loans to qualified borrowers, non-borrowers—large or small—would not be regulated by this rule.

Although the FFP requires certain supporting documentation during the life of a loan, the requirements do not impose unusual burdens when compared to the burdens imposed by other lenders. Moreover, because the basic need for financing would continue to exist without the FFP, the individuals seeking financing would still need to comply with similar, if not identical, requirements imposed by another lender. Records required to participate in the FFP are usually within the normal records already maintained by fishermen. It should take no more than eight hours per application to meet these requirements.

The information required from borrowers, such as income tax returns, insurance policies, permits, licenses, etc., is already available to them. Depending on circumstances, the FFP may require other supporting documents, including financial statements, property descriptions, and other documents that can be acquired at reasonable cost if they are not already available.

FFP lending is a source of long-term, fixed rate capital financing and imposes no regulatory requirements on anyone other than those applying for loans. FFP borrowers make a voluntary decision to use the available lending.

These loan programs will only have positive impacts on borrowers. Because participation is voluntary and requires effort and the outlay of an application fee, borrowers for harvesting rights financing are assumed to have made a determination that using FFP financing provides a benefit, such that the FFP's long-term, fixed rate financing provides only a positive economic impact. Importantly, the FFP does not regulate or manage the affairs of its borrowers, and the regulations impose no additional compliance, operating or other fees or costs on small entities other than those that a financing relationship would require.

Because this rule would not have a significant economic effect on a substantial number of small entities, an initial regulatory flexibility analysis is not required and none has been prepared.

### *Paperwork Reduction Act*

This proposed rule contains collection-of information requirements subject to the Paperwork Reduction Act (PRA). The collections of information have been approved by the Office of Management and Budget (OMB) under OMB Control Number 0648–0012 (loan application). The public reporting burden for the FFP financing is estimated to average no more than eight hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding these burden estimates or any other aspect of this data information, including suggestions for reducing the burden, to NMFS (see **ADDRESSES**) and by e-mail to *OIRA\_submission@omb.eop.gov*, or fax to 202–395–7285.

### **List of Subjects in 50 CFR Part 253**

Aquaculture, Community development groups, Direct lending, Financial assistance, Fisheries, Fishing, Individual fishing quota.

Dated: October 29, 2018.

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Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 253 is proposed to be amended as follows:

### **PART 253—FISHERIES ASSISTANCE PROGRAMS**

1. The authority citation for part 253 continues to read as follows:

**Authority:** 46 U.S.C. 53701 and 16 U.S.C. 4101 *et seq.*

2. Amend § 253.10 by:

- a. Revising the definition for subparagraph (1) under “Project”,
- b. Adding the definitions for “limited access system” and “Vessel construction financing” in alphabetical order.

The revisions and additions read as follows:

**§ 253.10 General definitions.**

\* \* \* \* \*

*Project* means:

(1) The financing or refinancing of the construction of a new fishing vessel or the financing or refinancing of a fishery or aquaculture facility or the refurbishing or purchase of an existing vessel or facility, including, but not limited to, architectural, engineering, inspection, delivery, outfitting, and interest costs, as well as the cost of any consulting contract the Program requires;

\* \* \* \* \*

*Limited access system* has the same meaning given to that term in section three of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1802.)

*Vessel construction financing* means either financing the ongoing construction of a new vessel from its inception through completion, including successful sea trials, or refinancing up to 80 percent of the cost of the construction of a new vessel upon the completion of such construction and successful vessel sea trails.

\* \* \* \* \*

3. In § 253.16 redesignate and revise paragraph (d) as paragraph (e) and add new paragraph (d) to read as follows:

**§ 253.16 Actual cost.**

\* \* \* \* \*

(d) The actual cost of a vessel which is the subject of vessel construction financing shall be determined as follows:

- (1) The initial actual cost shall be the estimated eligible costs of the construction; and
- (2) The final actual cost shall be the total final documented eligible costs of the completed construction.

(e) The actual cost of any Project that includes any combination of items described in paragraphs (a), (b), (c) or (d) of this section shall be the sum of such calculations.

4. Revise § 253.26 paragraphs (a) and (b) to read as follows:

**§ 253.26 Traditional loans.**

(a) *Eligible projects.* Financing or refinancing up to 80 percent of a project's actual cost shall be available to any citizen who is determined to be eligible and qualified under the Act and these rules.

(b) *Financing or refinancing.*

- (1) Projects may be financed, as well as refinanced.
- (2) The Program may finance the construction cost of a Vessel or Facility or refinance the construction cost of a Vessel or Facility that has already been financed (or otherwise paid) prior to the submission of a loan application.

(3) The Program may finance the refurbishing cost of a Vessel or Facility or refinance the refurbishing cost of a Vessel or Facility that has already been financed (or otherwise paid) prior to the submission of a loan application.

(4) The Program may finance or refinance the purchase or refurbishment of any vessel or facility for which the Secretary has:

- (i) Accelerated and/or paid outstanding debts or obligations;
- (ii) Acquired; or
- (iii) Sold at foreclosure.

\* \* \* \* \*

5. Add § 253.32 to read as follows:

**§ 253.32 Vessel construction financing.**

(a) *Project Performance and Completion.* The program, in the case of financing the ongoing construction of a new vessel will require a bond, insurance or reserve fund to protect against cost overruns and/or failure of the borrower to complete vessel construction in an amount up to thirty (30) percent of estimated construction cost. The amount and form of such protection shall be determined in the sole discretion of the Program. All costs associated with such protection shall be paid by the borrower. In the case of Vessel construction financing that only involves Program funding after the completion of vessel construction and sea trials, this section is not applicable.

(b) *Vessel Surveyor.* The program, in the case of financing the ongoing construction of a new vessel, will require the borrower to secure a vessel surveyor or naval architect for the period of vessel construction. The surveyor will report on the vessel's progress through construction and represent the Program's interest. All costs associated with such services shall be paid by the



borrower. In the case of Vessel construction financing that only involves Program funding after the completion of vessel construction and sea trials, this section is not applicable.

(c) *Replaced Vessel*. The vessel to be replaced by the new vessel must be named at the time of loan application. The replaced vessel:

- (1) Must be scrapped,
- (2) Continues to operate in a federally-managed fishery under limited access, or
- (3) Must have its federal fishery endorsement permanently cancelled and the vessel is permanently prohibited from fishing or providing support to fishing activities anywhere in the world; and the vessel's title is marked to prohibit the vessel's transfer to any foreign flag. If the vessel were ever to cease operation in a federally-managed fishery under limited access or is sold, then option (c) would automatically apply. This requirement must be completed within four (4) months from the closing of the financing. The borrower will authorize the Program and the United States Coast Guard Vessel Documentation Center to act on the borrower's behalf to make the vessel title changes if this requirement is not completed within the four (4) month requirement. Failure to comply with this requirement shall be an event of default under the loan.

(d) *Multiple loans*. In the case of financing the ongoing construction of a vessel, the Program may have to close multiple loans to meet shipyard payment demands or use an escrow account to hold funds. All costs, including but not limited to escrow fees, loan interest and quarterly payments, associated with either option shall be paid by the borrower.

(e) *Limited Access Fisheries*. All vessels constructed under this authority must be used only in a federally managed limited access system that is not deemed to be overfished or subject to overfishing.

6. Add § 253.33 to read as follows:

**§ 253.33 Managed Fisheries Requirement.**

(a) All financings shall require participation in managed fisheries with harvest limitations, and

(b) For vessel construction and harvesting rights loans, participation is further restricted to federally managed limited access systems that are not deemed to be overfished or subject to overfishing.

(c) The FFP will cease processing a loan application at any point during the process including at closing if the subject fishery is moved to an “overfished” or “subject to overfishing” category. Refunds of the application fee of one half of one percent of the amount requested once paid, irrespective of why the program denies a loan, are limited to 50 percent of the fee.

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